

IN THE CIRCUIT COURT OF THE STATE OF OREGON
IN AND FOR THE COUNTY OF MULTNOMAH

NANCY HENRY on behalf of herself and all
others similarly situated,

Plaintiff,

v.

NESTLE USA, INC. and GERBER PRODUCTS
COMPANY,

Defendants.

Case No.

**COMPLAINT AND DEMAND FOR
JURY TRIAL**

CLASS ACTION

CLAIMS NOT SUBJECT TO
MANDATORY ARBITRATION

PRELIMINARY STATEMENT

1.

Plaintiff Nancy Henry ("Henry") individually and on behalf of similarly-situated individuals, brings this action against Nestle USA, Inc. and Gerber Products Company ("Gerber"). Henry alleges that Gerber violated the Oregon Unlawful Trade Practices Act, ORS 646.605 *et seq.* by its marketing and labeling of Gerber Graduate Puffs products. On her own behalf and on behalf of similarly-situated individuals, Henry seeks an injunction, actual damages, statutory damages, and attorney fees. Henry provided notice and demand on both defendants as required by ORCP 32H. Defendants have not ceased in

1 their violations of the Unlawful Trade Practices Act. Nor have defendants made any
2 effort to identify affected potential class members and provide a remedy.

3 **PARTIES**

4
5 2.

6 Plaintiff Henry is a resident of Oregon who purchased Gerber's Puffs, including
7 Apple, Banana, Blueberry, and Sweet Potato Puffs for her family and her children. Ms.
8 Henry suffered ascertainable losses as a result of her purchases.

9
10 3.

11 Defendant Nestle USA, Inc. is a subsidiary of Nestle SA, a Swiss corporation that
12 does business worldwide. Nestle USA, Inc. is a Delaware Corporation that is
13 headquartered in California. Nestle USA controls the practices of Gerber Products
14 Company in this country.

15
16 4.

17 Defendant Gerber Products Company is a Michigan corporation that is
18 headquartered in New Jersey.

19 **JURISDICTION AND VENUE**

20
21 5.

22 Defendants engage in regular and sustained business in Oregon and in Multnomah
23 County. Defendants maintain registered agents for service of process in Oregon.

24 ///

25 ///

CLASS ALLEGATIONS

6.

The class consists of all consumers who, between one year before the date of commencement of this action and the date of certification, bought Gerber Graduates in Oregon. Excluded from the class are officers and directors of defendants, counsel for Henry, and any judge who decides any matter on this case.

7.

Members of the class are so numerous that joinder of most or all of them is impracticable. The exact number is unknown but based on Gerber's sales figures, may be determined from available information. As transactions take place in retail grocery establishments, the class is dispersed, making it harder to join all or most of the class into an action.

8.

Gerber is the best-known baby food company in the country. It promotes itself as a purveyor of healthful and nutritious baby food products, including, specifically, its Puff brands. Gerber has engaged in widespread and uniform marketing and advertising to sell Puffs as healthful and nutritious and to charge a premium price.

9.

Henry and members of the class purchase Gerber Puffs products to ensure that they are feeding their young children healthy snacks.

10.

1 Nestle promotes Gerber as one of the most trusted names in baby food and
2 affirmatively represents that Gerber baby food is committed to promoting good nutrition
3 and health eating habits for children. Nestle promotes Gerber Graduates as products that
4 offer a range of nutritious, delicious products for young children.
5
6

11.

7 Gerber Puffs are not the fruit- or vegetable-packed healthy snacks that the
8 labeling, promotions, and advertising make them out to be. While Gerber specifically
9 uses fruit and vegetable names in the Puffs products, the Puffs products contain none of
10 the represented fruit or vegetables.
11
12

12.

13 The Puff products contain no dietary fiber—a key substance found in fruits and
14 vegetables—and contain vitamins only due to a process of synthetic vitamin fortification.
15
16

13.

17 On its label, the Gerber Sweet Potato Puffs product prominently touts the sweet
18 potato feature by its name, the wording, and images of whole and sliced sweet potatoes.
19 In fact, there are no sweet potatoes in Gerber Sweet Potato Puffs. There are no vegetables
20 whatsoever. The only vegetable or fruit-related ingredients are “dried apple puree.”
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22
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14.

1 Similarly, on its label, the Gerber Banana Puffs product prominently touts the
2 banana feature by its name, the wording, and images of bananas. In fact, there are no
3 bananas. As with Sweet Potato Puffs, the only vegetable or fruit-related ingredients are
4 “dried apple puree.”
5
6

15.

7
8 Like the other products, on its label, the Gerber Peach Puffs product prominently
9 touts the peach feature by its name, the wording, and images of whole and sliced peaches.
10 The only peach is less than 2 percent “peach juice concentrate,” with a similarly trivial
11 amount of dried apple puree.
12
13

16.

14
15 There are questions of fact and law common to the class, in that each member of
16 the class suffered ascertainable losses as a result of Gerber’s misrepresentations and
17 omissions, as more fully set forth in ¶¶10-15 and . Common questions of law and fact
18 predominate over any questions affecting only individual class members. Common
19 questions include:
20
21

- 22 A. Whether the Gerber violated the Oregon Unlawful Trade Practices Act, ORS
23 646.608(1)(t) by failing to disclose a known material defect or material
24 nonconformity upon delivery of the goods;
25
26

- 1 B. Whether the Gerber violated the Oregon Unlawful Trade Practices Act, ORS
2 646.608(1)(g) by representing that the goods are of a particular standard,
3 quality or grade if the goods are of another;
4
5 C. Whether the Gerber violated the Oregon Unlawful Trade Practices Act, ORS
6 646.608(1)(e) by representing that the goods have particular characteristics,
7 ingredients, benefits, or qualities that they do not have;
8
9 D. Whether Henry and the class are entitled to equitable relief;
10
11 E. Whether Henry and the class are entitled to an injunction;
12
13 F. Whether Henry and the class suffered ascertainable losses as a result of the
14 violations;
15
16 G. Whether Henry and the class are entitled to recover attorney fees and costs as
17 set forth in ORS 646.638(1);
18
19 H. Whether Henry and the class are entitled to recover actual damages;
20
21 I. Whether Gerber acted recklessly or knowingly as set forth in ORS 646.638(1)
22 and (8);
23
24 J. Whether Henry and members of the class are entitled to recover statutory
25 damages of \$200; and,
26
K. Whether the statutory damages apply per transaction or per class member?

17.

The claims of the named plaintiff are typical of the claims of the class in that:

- A. All claims involve identical conduct in the omissions, representations, and disclosures;
- B. Gerber has acted in a uniform fashion in its marketing, labeling, packaging, design, and production of Gerber Graduates;
- C. The injuries suffered by the named plaintiff and the class members differ only in the amount of damage and number of transactions; and
- D. The named plaintiff's claims for relief are based upon the same legal theories as are the claims of the class members.

18.

The named plaintiff will fairly and adequately protect and represent the interests of the class, in that:

- A. Her claims are typical of the claims of the class members;
- B. She is represented by attorneys who are qualified and competent counsel who will vigorously prosecute this litigation; and
- C. Her interests are not antagonistic to or in conflict with the interests of the class members.

19.

1
2 A class action is superior to other available methods for the fair and efficient
3 adjudication of this case, in that:
4

5 A. Common questions of law and fact predominate over factors affecting only
6 individual members;
7

8 B. As far as plaintiff knows, no class action that purports to include Orewgon
9 consumers has been commenced;
10

11 C. Individual class members have little interest in controlling the litigation, due to
12 the high cost of each individual action, the relatively small amount of damages
13 suffered by any individual, and because plaintiff and her attorneys will
14 vigorously pursue the claims;
15

16 D. The forum is desirable because defendants do business here, and Multnomah
17 County has adequate resources to manage complex litigation;
18

19 E. A class action will be an efficient method of adjudicating the claims of the
20 class members who have suffered relatively small monetary damages as a
21 result of the same type of conduct by defendants;
22

23 F. In the aggregate, class members have claims for relief that are significant in
24 scope, relative to the expense of litigation;
25

26 G. Injunctive relief will prevent further harm.

20.

Through uniform misrepresentations and omissions, Gerber violates the Unlawful Trade Practices Act in one or more of the following ways:

- A. Gerber fails to disclose known material defects and material nonconformities upon delivery of the goods, in that it omits to disclose that the products contain no vegetables, virtually no fruit, and no fiber and that the products are not healthful and not nutritious, in violation of ORS 646.608(1)(t);
- B. Gerber misrepresents that the goods are of a particular standard, quality or grade if the goods are of another, in violation of ORS 646.608(1)(g); and
- C. Gerber misrepresents that the goods have particular characteristics, ingredients, benefits, or qualities that they do not have in violation of 646.608(1)(e).

21.

As a result of these omissions and misrepresentations, Henry and the class suffered ascertainable losses by overpaying for the goods that were worth less than represented and by receiving inferior quality goods.

22.

Gerber's conduct was willful, reckless, and/or knowing and was undertaken with the intent to obtain more profits from their sales.

CLAIM FOR RELIEF

VIOLATION OF UNLAWFUL TRADE PRACTICES ACT

First Count-Willful Violation

23.

Gerber willfully violated ORS 646.608 in one or more of the ways alleged in ¶20, and as a result Henry and the class suffered the previously-described ascertainable losses.

24.

Henry and the class are entitled to actual damages, equitable relief, an injunction, and attorney fees. ORS 646.638; ORS 646.636.

Second Count-Reckless or knowing violation

25.

Plaintiff reincorporates ¶¶1-22

26.

Gerber knowingly or recklessly violated the ORS 646.608 in one or more of the ways alleged in ¶20, and as a result Henry and the class suffered the previously-described ascertainable losses.

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27.

Henry and the class are entitled to recover statutory damages of \$200 per violation. ORS 646.638(1) and (8). Plaintiff and the class are also entitled to equitable relief, an injunction, and attorney fees. ORS 646.638; ORS 646.636.

WHEREFORE, plaintiff prays for judgment against defendants and seeks the following relief:

1. An order certifying this matter as a class action pursuant to ORCP 32;
2. On plaintiff's claim for relief an injunction, equitable relief, actual damages in an amount to be proved at trial, statutory damages of \$200 per class member, and attorney fees and costs; and,
3. Such other relief as the Court may deem just.

DATED this 21st day of September, 2015.

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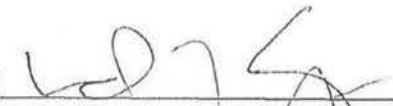
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JURY TRIAL DEMAND

Plaintiff demands a jury trial.

DATED this 21st day of September, 2015.

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